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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1973

No. 73-1109

JESUS CANALES, et al., *Petitioners,*

vs.

CITY OF ALVISO, et al., *Respondents.*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI to the Court of Appeal of the State of California, First Appellate District, Division Two

INTRODUCTION

In reviewing the Petition For a Writ of Certiorari in the instant case, one is reminded of the story of the Phoenix. This case began with an election contest filed almost six (6) years ago. Since that time, the case has been heard twice by the California Superior Courts, twice by the California Appellate Courts, and once by the California Supreme Court. The California Supreme Court refused to hear the matter again, and one might have thought at this point, that the lengthy

matter had finally been resolved. However, now petitioners request a review of the State Appellate Court's decision, alleging infringement of rights protected by the United States Constitution.

Their position seems to be reducible to the proposition that whenever in an issue election setting, the existence of illegal offers of consideration (ostensibly in this case the purported offers of jobs to firemen and purported promises of a five-year moratorium on building code enforcement to Alviso residents) is established, or whenever illegal votes equal to the margin of victory are established, the election, because of constitutional requirements must, "ipso facto," be set aside. They insist that a requirement to show causation between the offers made or the illegal votes cast and the result of the election will in some mysterious way cause a violation of the equal protection provisions of the Fourteenth Amendment to the United States Constitution.

We contend that such a proposition cannot even exist in the context of this case unless this Court concludes that an independent review of the record is required by the Federal Constitution. This is so because the finding of the trial court was that no such illegal offers had ever been made, and that a sufficient number of illegal votes had in fact been cast against the election result, and thus the illegal votes cast for the winning side did not equal the margin of victory.

We maintain that independent review has no place in the case at hand. Additionally, we maintain the

proposition advanced by petitioners finds no support in the law and is in fact violative of public policy.

ARGUMENT

PART I:

THE CONCEPT OF INDEPENDENT REVIEW IS NOT APPLICABLE TO THIS CASE

Petitioners assert that we are dealing with a fundamental freedom, the right to vote; that dilution of voting rights here exist; and that, therefore, this Court must make an independent review of the record. Such an independent review of the record by this Court is critical to petitioners' position, since the trial court found that no illegal offers were made and that a majority of legal votes were cast for consolidation.

None of the cases, *Norris v. Alabama*, 294 U.S. 587 (1935); *Haynes v. Washington*, 373 U.S. 503 (1963); *Edwards v. South Carolina*, 372 U.S. 229 (1963); *Jacobellis v. Ohio*, 378 U.S. 184 (1964), cited by petitioners to establish the proposition that this Court must make an independent review of the record is relevant to our case. *Norris*, supra, involved quashing an indictment for rape against a Negro defendant, on the basis that the State practice in Alabama to exclude Negroes from the Grand Jury was violative of the equal protection clause of the Fourteenth Amendment. *Haynes*, supra, involved setting aside a crimi-

nal conviction for robbery on the grounds of an involuntary confession where the evidence establishing same was undisputed. *Edwards,* supra, involved freedom of speech, a conviction of Negroes in a southern state for a breach of the peace where the uncontradicted evidence in the record showed a peaceable assemblage, without any violence or the threat thereof. *Jacobellis,* supra, involved a conviction of a motion picture theatre manager, under an Ohio obscenity statute, for processing and exhibiting a movie called "The Lovers", and thus also involved freedom of speech.

None of the authorities cited, all of which are criminal cases, in which independent review of the record has been applied is even remotely analogous to our case on its facts, and none of the cases involved dilution of voting rights, or even the subject of voting. We submit that the doctrine of independent review has no place in the instant case.

To involve this Court in an independent review of the record "de novo", without any compelling legal precedent in an election contest where no evidence of fraud or intentional misconduct exists would, in effect, be disruptive of the democratic process. Certainty in elections is necessary for proper functioning of the democratic process. To hold election results in doubt for protracted periods of time would be destructive of the working of government. This is why the election contest procedures themselves, which are the statutory vehicle for resolving disputes over elections, require a much speedier disposition of the issues

than other types of cases.[1] That is why the policy of the law is to uphold elections. *Simpson v. City of Los Angeles,* 40 Cal.2d 271 (1953); *Davis v. County of Los Angeles,* 12 Cal.2d 412 (1938); *Ridcout v. City of Los Angeles,* 185 Cal. 426 (1921); *People v. Prewett,* 124 Cal. 7 (1899).

The trial court has found that sufficient legal votes were cast to carry the election, and no illegal actions occurred which determined the outcome of the election. If a trial court performs its function in our judicial system and on the basis of substantial evidence finds facts which uphold the election, the result should not be disturbed in the absence of clear errors of law. To operate otherwise would be to involve the appellate judiciary in the improper role of fact finder without having had an opportunity to observe the demeanor of the witnesses and to invite election contests. If the independent review principle is to be applied

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[1]The petitioners must file the statement of contest: (a) in cases other than a tie, where the contest is brought on any of the grounds mentioned in §20021(e) of the California Elections Code, not later than six (6) months; (b) in cases of ties, not later than twenty (20) days; and (c) in all other cases not later than thirty (30) days after the declaration of result of the election by the body canvassing the returns. Cal. Elections Code §20051.

The judge must, after notification by the County Clerk of the filing of the statement of contest, forthwith designate the time and place of hearing which shall be not less than ten (10) nor more than twenty (20) days from the date of the Order. Cal. Elections Code §20080.

The court may not adjourn the trial for more than twenty (20) days. Cal. Elections Code §20083.

The court must file its findings of fact and conclusions of law within ten (10) days after submission of proof and allegations and must immediately thereafter pronounce judgment and the judgment must be entered immediately thereafter. Cal. Elections Code §20086.

to election contests in the manner suggested by petitioners, it would be much better to give exclusive jurisdiction over election contests to the United States Supreme Court. This would avoid all of the time consumed in the trial and intermediate appellate process, would assure speedy determination of election disputes and avoid uncertainty and delay in the running of government.

PART II:

ESTABLISHMENT OF ILLEGAL OFFERS IN AN ISSUE ELECTION CONTEST ARE NOT AUTOMATIC GROUNDS FOR OVERTURNING AN ELECTION.

Petitioners contend that the City of San Jose offered jobs to firemen illegally, and illegally promised to allow a grace period within which Alviso residents could bring their homes up to building code standards. They further argue that once any such "*illegal*" offers are established in an issue election, such election must be set aside on equal protection grounds, without the further showing that such offers had a determinative effect on the election results. The record in this case is absolutely clear that no illegal offers of consideration were made. The trial court so found, which finding was upheld, in toto, by the State Court of Appeal after an exhaustive analysis of the record.

It is incredible to assert that exercising reason in code enforcement and explaining the City's position with reference to future employment plans for employees of Alviso, in the context of an election, when false stories were being circulated about what consol-

idation would bring, could violate equal protection of the laws. Certainly none of the cases cited by the petitioners even remotely support any such principle. *Wesberry v. Saunders,* 376 U.S. 1 (1964), struck down a Georgia congressional districting statute as violative of the people's right to choose congressmen, under Article 1, Section 2 of the Federal Constitution, where the uncontested evidence was that the statute's application resulted in unequal congressional representation on the basis of population. *Williams v. Rhodes,* 393 U.S. 23 (1968), held that an Ohio election law requiring a new political party seeking ballot position in a presidential election to obtain petitions signed by qualified electors totaling fifteen percent (15%) of the number of ballots cast in the last gubernatorial election, while the Democratic and Republican parties could retain their ballot positions by polling ten percent (10%) of the votes in the last gubernatorial election and did not need to obtain signature petitions, violated the equal protection clause of the Fourteenth Amendment, since it burdened the right of individuals to associate for the advancement of political beliefs and the right to cast their votes effectively and since the State showed no compelling interest justifying such burdens. The case of *Shakman v. Democratic Organization,* 435 F.2d 267 (7th Cir. 1970), cert. den. (1972), 402 U.S. 909, indicated that a complaint alleging that the officers of the City of Chicago and Cook County requiring city and county employees as a condition of holding their jobs and drawing their salaries from the public treasury to fur-

nish votes, campaign work and money to elect candidates chosen by the regular democratic organization and that such practice makes more difficult and often prevents the election of other candidates stated a cause of action should not have been dismissed by the district court. It should be noted that the remedy prayed for was a declaration that the practices of the defendants violated constitutional rights of candidates, an injunction against such practices and damages. There was no prayer that any election be set aside, for indeed no election was at issue. *Lucas v. Forty-Fourth General Assembly,* 377 U.S. 713 (1964), held that the overall legislative representation in the two (2) houses of the Colorado legislature was not sufficiently grounded on population to be sustainable under the equal protection clause.

It should be observed that we are not here dealing with a denial of equal representation in the legislature, or a refusal to have one's name or party placed on the ballot, or with a condition that one must vote a certain way, contribute money or campaign to get or keep a job. We are dealing with the right of a city in an election to indicate what its position will be with respect to certain issues. Even assuming, arguendo, the worst about the statements made by San Jose and its adherents, in a contest between freedom of speech and the right to vote, freedom of speech is paramount as long as there were no conditions imposed by San Jose with respect to voting a certain way, or expressing opinions on the election, and especially if there is no showing that the statements

made by the respondents determined the election outcome.

It should also be observed that in every case, except *Shakman*, cited by petitioners to establish that equal protection of the laws was denied those opposed to consolidation, state or local regulations or statutes are involved. But no city ordinance or statute in any way impaired the voting rights of petitioners.

Secondly, the injury complained of in each case was clear and uncontested; i.e., being kept off the ballot or being deprived of equal representation, and in *Shakman,* the issue before the court on appeal was whether the plaintiff had stated a cause of action. For such purposes, the allegations of the complaint and thus the injury complained of on appeal, that of illegally requiring votes, contribution of money and campaign time as a condition to gaining or retaining a job were taken as true. Here the injury complained of, namely, dilution of voting rights, is the very issue. How have petitioners established that anything done by San Jose which petitioners are complaining about determined the result of the election and thus trod upon their voting right?

Thirdly, in no case cited by petitioners to establish denial to them of equal protection of the laws was there a clash between a legitimate exercise of freedom of speech and voting rights. This is the issue in this case. Are we to extend the law to so assiduously protect voting rights, that freedom of speech is substantially impaired. Unless there can be free exchange, free expression in elections, unless the elec-

torate can be informed on the positions of the parties' candidates, or in this case, the position of the City of San Jose, how can the voter be informed and vote intelligently? Even the voting cases say that literacy requirements if uniformly and reasonably applied, can be imposed as a condition for voting, since having an intelligent and well informed electorate on the issues is a legitimate state interest and concern. *Lassiter v. Northampton City Board of Elections,* 360 U.S. 45 (1959). The same legitimate state interest and concern, that of having an intelligent and well informed electorate, is served by telling the electorate where one stands on election issues.

Even assuming arguendo, however, that petitioners had been able to establish the existence of such illegal offers, it does not follow that the election should be set aside without a further showing that such offers had a pivotal impact on the election results. Such a showing must be required in conformity with the spirit of the Elections Code and the policy of upholding elections. Otherwise, a few isolated illegal actions could overturn an election which had carried by a healthy majority. Election contests would be the order of the day, and *no* election would be immune, since men are at the present stage of evolution, still human and not yet angels.

This would fly in the face of the policy of upholding elections, and chaos and uncertainty would be substituted in place of order and certainty. Such a rule would prejudicially deprive those who had cast their vote for the winning side of a fundamental liberty to

have their vote counted without dilution. *Reynolds v. Sims,* 377 U.S. 533 (1964).

Petitioners are unable to present this Court with any relevant authority to sustain their novel and unrealistic position that an issue election can be overturned by a mere showing of illegal offers, for no such authority exists.

The only authority cited by petitioners is *Mills v. Electric Auto Lite Co.,* 396 U.S. 375 (1970). This was a case in which the Supreme Court in construing a federal statute, whose purpose was to compel disclosure, determined that establishment of material misrepresentation in proxy statements in a proposed corporate merger was sufficient to establish a cause of action for violation of the Securities Exchange Act without a further showing that such misrepresentation had brought about the merger. The court did not, as petitioners have incorrectly stated, determine that such misrepresentation was sufficient grounds for setting aside the merger. The court merely found it to be sufficient grounds, under the Securities Exchange Act, to establish a cause of action for violation of the Act, remedies for the violation of which included recovery of damages, as well as setting aside the merger. The court explicitly declared that the trial court should determine the remedy, and that there need not be and in fact should not be dissolution of the merger unless the lower court concluded from all the circumstances that it would be equitable to do so. It is apparent that the *Mills* case deals with corporate elections, not public elections, and that the

competing policy to uphold public elections is not present. It is clear that the case concerns construction of a federal statute and not whether the statute was constitutional. The plaintiffs in the case never asserted the statute would have been unconstitutional had it required a showing that the misrepresentation had brought about the merger, but merely that the Act did not require such a showing. It is additionally clear that there was not present in the *Mills* case a clash between freedom of speech and voting rights. For the *Mills* case involved misrepresentation and failure to disclose. Yet in the instant case, petitioners are not asserting there was any misrepresentation or failure to disclose by San Jose of its intentions with respect to what would happen upon consolidation. Quite the opposite. They are complaining that what was said was illegal, not that it was false or misleading. But the State trial court determined that the so-called offers by San Jose were not illegal, but a legitimate exercise of freedom of speech.

PART III:

ILLEGAL VOTES MUST DETERMINE AN ELECTION RESULT BEFORE THEY CAN CONSTITUTE GROUNDS FOR OVERTURNING AN ELECTION.

In the case at hand, the trial court found, as indicated in the State Court of Appeal's decision which appears in an appendix submitted under separate cover by petitioners, that 189 votes had been cast for consolidation; that 180 votes had been cast in opposition to consolidation; that 9 illegal votes had been

cast; that of the 9 illegal votes, 4 had been cast against consolidation, 2 in favor of consolidation, and that it could not be ascertained from the evidence how the remaining 3 illegal ballots had been cast; that 360 legal votes had been cast at the election, a majority of which is 187; that 187 legal votes had been cast for consolidation; that even if all of the said remaining illegal voters should be found to have voted against consolidation, there would still be 184 legal votes cast in favor of consolidation.

Petitioners contend that the one-man one-vote rule of the Fourteenth Amendment requires that an election be set aside whenever the existence of illegal votes equal to the difference between the winning and losing side is established. It is true in the instant case that the trial court found the existence of 9 illegal votes, equal to the difference between the winning and losing side. But the same trial judge found from the evidence how 6 of the 9 illegal votes were cast. He deducted the 4 illegal votes he found cast against consolidation from the side opposed to consolidation, and deducted the 2 illegal votes he found cast for consolidation from the side favoring consolidation. There were only 3 illegal votes which the trial judge found himself unable to place either in the "for" or "against" column. Even assuming that these 3 votes were cast for consolidation and deducted from that side, the consolidation measure would still pass by a majority of legal votes. Thus, the illegal votes were purged from the election process and played no part in the election result. Petitioners might better argue

(although no cases support even this position) that the Constitution demands an election be set aside whenever illegal votes exist which equal the margin of victory, and the court is *unable* to determine from the evidence how they were cast. However, as above stated, this situation does not exist in our case.

Petitioners must argue that the Fourteenth Amendment of the United States Constitution allows the trial judge to sit in election contests as fact finder with reference to the existence of illegal votes, but deprives him of his right to sit as fact finder with reference to how such illegal votes had been cast. Under this theory, the trial judge would be foreclosed as a matter of law from *ever* determining how an illegal vote had been cast in an election contest, no matter how clear and uncontradicted the evidence was, no matter what the circumstances. This is preposterous, and of course, petitioners have cited no cases to support their principle. Petitioners attempt to justify such an absurd position by asserting that our legal system, which seems to be sufficient to determine facts in every other type of case, is somehow totally inadequate to establish how an illegal voter cast his vote in an election contest case. Petitioners had every chance to establish by the evidence that all or some of the illegal voters cast their votes for consolidation. They failed to do so, not because any weakness or inadequacies in our legal system exist, but because of their own weakness and inadequacies to produce sufficient evidence on the point. Petitioners first assume that all the illegal voters cast illegal votes for sinister reasons,

and that therefore would lie when asked how they voted. In the instant case, the trial court found that all the illegal votes were illegal because of misunderstanding and ignorance and that there was no fraudulent intent to improperly register or vote on the part of such voters. There is no reason to assume why all, or even any, of such voters if asked would lie as to how they cast their vote. But even if they did, skilled questioning by trial counsel and the evaluation of the responses by the trial judge should be appropriate to protect the interests of both sides and sufficient to arrive at the truth of the matter.

To accept petitioners' position would result in a rash of election contests. Petitioners argue that election contests are rare and even rarer where the number of illegal votes constitutes the difference between winning and losing. From this, they reason that to set aside this election will not mitigate against the policy of upholding elections and of preserving certainty in elections. Of course, election contests are rare because of the policy to uphold them if at all possible. Petitioners are not encouraged to file because of that very policy. Any relaxation of the policy, especially of the type here proposed, will certainly not dissuade prospective petitioners from filing, but stimulate them to file.

If this Court concludes that the Federal Constitution dictates the setting aside of elections whenever the number of illegal votes equals the difference between the winning and losing sides, it will be encouraging an ever increasing number of election contests.

CONCLUSION

Certiorari is not a matter of right, but discretion, and will be granted *only* where there are special and important reasons therefor. In exercising such discretion, this Court should consider that petitioners have been given not once, but twice, a full airing of every aspect of their case at all levels of the California court system. The California Supreme Court, a pacesetter in making new law, a court of some distinction and with a reputation of not shirking the resolution of constitutional issues, but rather of openly embracing novel constitutional questions and sensitive to the full protection of constitutional rights, has concluded a rehearing of the matter was not warranted.

To grant certiorari in the case at hand on the basis of the tenuous showing by petitioners of the supposed deprivation of their constitutional rights, in the context of an election contest where upholding election results if possible is a datum, where certainty and speedy resolution of disputes is a well-established policy grounded in sound logic, would be unthinkable.

Dated this 13th day of February, 1974, at San Jose, California.

Respectfully submitted,

DONALD C. ATKINSON,
Division Chief Attorney, City of San Jose
Attorney for Respondents.